IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE HARUN-UL-RASHID

WEDNESDAY, THE 12TH DECEMBER 2007 / 21ST AGRAHAYANA 1929

Mat.Appeal.No. 196 of 2007()

(ORDER DT. 28.2.2007 IN O.P.1599/06 OF FAMILY COURT, THRISSUR)

PETITIONER: RESPONDENT

BINI, AGED 27 YEARS,
D/O.MANI, URAKATH HOUSE, NETTISSERY,
P.O.MANNUTHY, THRISSUR.

BY ADV. SRI.PHILIP M.VARUGHESE

RESPONDENTS: PETITIONER

SUNDARAN K.V., AGED 36 YEARS,
S/O.VELAYUDHAN, KODAKKIL VEEDU,
P.O.PEECHI, THRISSUR.

BY ADV. SRI.DILIP J. AKKARA

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 14.11.2007, THE COURT ON 12/12/2007 PASSED THE FOLLOWING:

ORDER ON I.A.NO.934/07 IN MAT.APPEAL NO.196/07

DISMISSED

12.12.2007. SD/- KURIAN JOSEPH, JUDGE.

SD/- HARUN-UL-RASHID, JUDGE.

KURIAN JOSEPH & HARUN-UL-RASHID, JJ.

Mat.Appeal No.196 of 2007

Dated this the 12th day of December, 2007

JUDGMENT

Kurian Joseph,J.

The need for and role of conciliation for reconciliation and settlement in disputes relating to marriage and family affairs pending before the Family Courts is the crux of the subject matter arising in this appeal. In the process, a noval question to be decided is, whether conciliation is mandatory after the introduction of the Family Courts Act in a petition under Section 13 of the Hindu Marriage Act even on the excepted grounds of conversion to another religion, renunciation of the world, mental disorder, venereal diseases and leprosy.

2. The respondent-husband approached the Family Court, Thrissur under Section 13 of the Hindu Marriage Act, 1955 seeking a decree of divorce on the ground that the appellant-wife had ceased to be a Hindu by conversion to another religion. On appearance of the appellant and on the mere admission of such fact, the Family Court granted a decree of divorce. Aggrieved,

the appeal at the instance of the wife contending mainly that by conversion to another religion alone the marriage does not ipso facto get dissolved and that the Family Court should have made an attempt to see whether a reconciliation or settlement is yet possible in the matter.

3. The Family Courts Act, 1984 was introduced to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith. In the Statement of Objects and Reasons it is stated thus:-

> "Several associations of woman, other organisations and individuals have urged, from time to time,that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be

> adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes"

It is further stated that the Bill was intended "to make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and the rigid rules of procedure shall not apply". It is clear from the Statement of Objects and Reasons for introducing the law relating to Family Courts that in dealing with the disputes regarding family affairs the first attempt of resolution of such disputes should be by conciliation, so as to enable the parties to have reconciliation or settlement. It is with that object in mind only, it was provided under Section 13 of the Act that a legal practitioner shall not be entitled to represent the parties as a matter of right. In dealing with the procedure before the Family Court it was made obligatory on the part of the Family

Court to make every endeavour in the first instance to assist and persuade the parties to arrive at a settlement in respect of the subject matter of the proceedings before the Court. If there is a reasonable possibility of settlement of the disputes between the parties, the Family Court is bound to adjourn the proceedings for such period in order to facilitate attempts for reconciliation or settlement. To the extent relevant Section 9 reads as follows:-

> "9. Duty of Family Court to make efforts for settlement.- (1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.
>
> (2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.
>
> (3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of, any other power of the Family Court to adjourn the proceedings."

Under Rule 18 of the Family Courts (Procedure) Rules, 1989 framed by the High Court of Kerala in exercise of its power under Section 21 of the Act for carrying out the purpose of the Act, it is provided as follows:-

> "18. Reconciliation.-- The court shall make every reasonable effort for bringing about reconciliation or settlement between the parties in the first instance in every case where it is possible to do so consistent with the nature and circumstances of the case, in such manner as it deems fit, with the help of counsellors nominated by the Court."

Under Rule 14 of the Family Courts (Kerala) Rules, 1989 framed by the Government of Kerala in consultation with the High Court of Kerala in exercise of its power under Section 23 of the Act, for the purpose of this Act, it is provided that "There shall be attached to each Family Court a Counselling Centre to be known as "The Counselling Centre of the Family Court of ....." Under Rule 15 there shall be a Principal Counsellor and such number of Counsellors as determined by the Government in consultation with the High Court. Under Rule 22 the Family Court Judge is bound to direct the parties to consult the specified

counsellor for the purpose of counselling. Under Rule 24 while dealing with the counselling procedure it is provided that "the parties shall be bound to consult the counsellor on the date and the time so fixed." Under Rule 25 in case any party does not co-operate with the counselling the Family Court is even entitled to take appropriate action against such defaulting party. Rule 26 reads as follows:-

> "26. Duties and functions of a Counsellor.--(1) Counsellor entrusted with any petition shall assist and advise the parties regarding the settlement of the subject matter of dispute between the parties or any part thereof. The Counsellor shall also help the parties in arriving at reconciliation.
>
> (2) The Counsellor in the discharge of his duties shall be entitled to pay home visits to the homes of any of the parties.
>
> (3) The Counsellor in the discharge of his duties shall be entitled to interview relatives, friends and acquaintances of parties or any of them.
>
> (4) The Counsellor in the discharge of his duties may seek such information as he may deem fit from the employer of any of the parties.
>
> (5) The Counsellor may in the discharge of his duties refer the parties to an expert in any

other area such as medicine or psychiatry."

Under Rule 35 "When the parties arrive at a settlement before the Counsellor relating to the dispute or any part thereof, such settlement shall be reduced to writing and shall be signed by the parties and countersigned by the Counsellor. The court shall pronounce a decree or order in terms thereof unless the court considers the terms of the settlement unconscionable or unlawful". Under Section 37 even if a matter is closed before the Family Court, the Counsellor is entitled to supervise, guide or assist the reconciled couples.

3. Section 13 of the Hindu Marriage Act, 1955 provides for various grounds for a decree of divorce. Under Section 23 of the Hindu Marriage Act, 1955 the Court is to grant a decree where ground for relief exists. Under sub-section (2) of Section 23 it is provided that it is the duty of the court first to make an endeavour to bring about reconciliation between the parties. But no such endeavour is necessary where the relief is sought on the grounds provided under Sub-clause (ii) to (vii) of Section 13(1). Section 23 reads as follows:-

"23. Decree in proceedings.-- (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that --

(a) any of the grounds for granting relief exists and the petitioner except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (ii) of Section 5 is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified in clause (i) of sub-section (1) of Section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and

(c) the petition (not being a petition presented under Section 11) is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted,

then and in such case, but not otherwise, the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do

consistently with the nature and circumstances of the case to make every endeavour to bring about a reconciliation between the parties;

Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (1) of Section 13.

(3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court, as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report.

(4) In every case where a marriage is dissolved by a decree of divorce, the court passing the decree shall give a copy thereof free of cost to each of the parties."

Section 13 reads as follows:-

"13. Divorce.-- (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party --

(i) has, after the solemnisation of the

marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(ia) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) has ceased to be a Hindu by converson to another religion; or

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation. -- In this clause, --

(a) The expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires

or is susceptible to medical treatment; or

(iv) has been suffering from a virulent and incurable form of leprosy; or

(v) has been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive."

Adultery and cruelty are thus the two areas where possibility for reconciliation is to be explored under the Hindu Marriage Act. The question is, in view of the exclusion of endeavour for reconciliation in respect of the grounds available under clauses (ii) to (vii) should there be endeavours for reconciliation or settlement by the Family Court.

4. Section 10 of the Family Courts Act has made applicable the provisions of the Code of Civil Procedure to the suits and proceedings before the Family Court. Under Section 10(3) the Family Court also is free to evolve its own procedure with a view to arrive at a settlement of the cases. Section 10 reads as

follows:-

> "10. Procedure generally.--(1) Subject to the other provisions of this Act and the Rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.
>
> (2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.
>
> (3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other."

Order XXXII-A was inserted by the C.P.C. Amendment Act 104 of 1976. "The provisions of this Order shall apply to suits or proceedings relating to matters concerning the family", as per Rule 1. Under sub-rule (3) to Rule 1 it is also provided that in case there is any special provision or procedure under any special

law, to that extent the order will not apply. Order XXXII-A Rule 1 (3) reads as follows:-

> "1(3) So much of this Order as relates to a matter provided for by a special law in respect of any suit or proceeding shall not apply to that suit or proceeding."

Under Order XXXII-A Rule 3 it is the duty of a court to make efforts for a settlement. Rule 3 reads as follows:-

> "3. Duty of Court to make efforts for settlement.-(1) In every suit or proceeding to which this Order applies, an endeavour shall be made by the Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.
>
> (2) If, in any such suit or proceeding, at any stage it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.
>
> (3) The power conferred by sub-rule (2) shall be in addition to, and not in derogation of, any other power of the Court to adjourn the proceedings."

Recently the Supreme Court had occasion to consider the issue regarding the duty of courts under Order XXXII-A Rule 3 in Jagraj

Singh v. Birpal Kaur, (2007) 2 SCC 564. It has been held that "Order 32-A Rule 3 CPC requires the court to make efforts for settlement of family disputes. The Hindu Marriage Act, 1955 is a special Act dealing with the provisions relating to marriages, restitution of conjugal rights and judicial separation as also nullity of marriage and divorce. The approach of a court of law in matrimonial matters is much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire. Matrimonial matters must be considered by courts with human angle and sensitivity. Delicate issues affecting conjugal relations have to be handled carefully and legal provisions should be construed and interpreted without being oblivious or unmindful of human weaknesses." In Manju Singh v. Ajay Bir Singh, AIR 1986 Delhi 420 the Court went to the extent of even holding that if an endeavour for reconciliation is not made, the order would be illegal. To quote on the principle:-

> "Section 23(2) of the Act gives a direction to the Court that before proceeding to grant any relief under the Act it shall be the duty to endeavour to bring about reconciliation between the parties except in the cases mentioned in the proviso to the sub-

> section. The intention of the legislature is that an attempt should be made by the Court for reconciliation before proceeding with the hearing of the petition. The provision is mandatory and an effort for reconciliation is to be made by the Court right from the start of the case by directing and giving reasonable opportunity to the parties to appear in person before the Court, even the filing of the written statement by the opposite party should not be insisted, and reconciliation should be attempted by the Court. If reconciliation attempt fails, written statement be filed. The Court however is to watch the proceedings during trial and make further attempt for reconciliation at any stage deemed appropriate by the Court. But in any case duty is cast upon the Court to try reconciliation between the parties before finally deciding the proceedings under the Act. The words "before proceeding to grant any relief", mean during the course of trial i.e. right from the date when the opposite party is served till the date of giving final decision."

5. However, it has to be seen that conciliation is mandatory only in respect of three grounds under the Hindu Marriage Act, namely adultery, cruelty and desertion, which are enumerated under Section 13(1)(i), (i-a) and (i-b). The Delhi High Court has taken the view that on grounds of conversion to another religion, renunciation of the world, mental disorder, venereal diseases and leprosy, no conciliation is required since they are expressly

excluded under proviso to Section 23(2) of the Act. It has to be noted that there is no discussion as to the impact of the Family Courts Act nor is the issue discussed regarding the impact of the exempted clauses as per proviso to Section 23(2) by the apex court in Jagraj Singh's case (supra). Therefore, the crucial question again is, after the introduction of the Family Courts Act 1984 is conciliation mandatory in a matrimonial dispute, whatever be the ground taken for dissolution, divorce or nullity.

6. The Family Courts Act, 1984 has an overriding effect over all other laws, notwithstanding anything inconsistent contained in such laws. The relevant provision, Section 20, reads as follows:-

> "20. **Act to have overriding effect.** -- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

It has also to be seen that under Section 9 of the Family Courts Act, there is no such exclusion of endeavours for reconciliation on any ground.

7. The provisions of the Family Courts Act, the Rules framed by the High Court and the State, the amended Code of Civil Procedure would clearly show the role of conciliation for reconciliation/settlement of disputes in family affairs. The primary object is to promote and preserve the sacred union of parties to a marriage. Only if the attempts for reconciliation are not fruitful, the further attempt on agreement on disagreement shall be made by way of settlement. Resolution of the disputes between the parties to a marriage on grounds available under law should be gone into only after the procedure under the Rules is followed through the counsellors to find out the possibility of reconciliation of the parties to the marriage or settlements of their disputes, however grave be the ground for separation. When a man and a woman are called upon to be one, though ideally one would expect them to be one for all purposes, differences of opinion are bound to be there on various grounds. After all, it is a fusion of two personalities. In the event of such bickerings, even if a party to a marriage is entitled to succeed on any of the available grounds under law, the Family Court shall

first make an attempt for reconciliation and if that fails, a further attempt for settlement and thereafter only proceed to the trial. It is one thing to say that a party is entitled to get relief on any of the available grounds under law but it is yet another thing to say that de hors the legal entitlement, reconciliation/settlement ignoring such legal grounds is possible. A settlement in a matrimonial dispute need not necessarily be based on strict legal grounds but more on what the parties perceive on a just and reasonable settlement based on mutual concessions. Such a compromise acceptable to the parties need not also coincide with the terms of a legally correct decision. If the law expects that refinement, reconciliation and settlement is to be first attempted, without following such a procedure, the Family Court shall not dispose of the suit or proceedings before it either granting the relief or declining the relief on the entitlement or disentitlement on legal grounds. It is not necessary that by mere conversion the marital tie should be broken. In a secular country like India and a literate State like Kerala where mixed marriage itself is a well accepted course, on the mere ground of conversion to

another religion of one of the Hindu parties to a marriage during the subsistence of the marriage, the marital tie need not be broken. The parties can disagree on matters of faith and still lead a happy marital life if they could be convinced that matters of faith should not stand in the way of union of hearts. Thus though under the Hindu Marriage Act, 1955 no endeavour for reconciliation need be made in a petition for divorce on the ground of conversion to another religion, or other grounds excepted under Section 13(1) of the Hindu Marriage Act or on similar or other grounds available under any other law also, after the introduction of the Family Courts Act, 1984, the Family Court is bound to make endeavours for reconciliation and settlement. The requirement is mandatory. That is the conceptual change brought out by the Family Courts Act, which is a special statute.

8. In the instant case the Family Court has not made any efforts for conciliation. On the mere admission of conversion, a decree has been granted, without making any endeavour for reconciliation and settlement. That is against the spirit and mandate of the provisions under the Family Courts Act, 1984.

We set aside the impugned order and remit the matter to the Family Court to proceed afresh in the matter in accordance with law.

The Registry shall immediately forward a copy of this judgment to all the Family Courts.

(KURIAN JOSEPH, JUDGE)

(HARUN-UL-RASHID, JUDGE)

ahg.

KURIAN JOSEPH &
HARUN-UL-RASHID, JJ.

Mat.Appeal No. 196 of 2007

JUDGMENT

12th December, 2007